In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-20-00075-CR

MARK ALAN HARRENSTEIN, Appellant

V.

THE STATE OF TEXAS

On Appeal from the 90th District Court
Young County, Texas
Trial Court No. 11247

Before Kerr, Birdwell, and Womack, JJ.
Memorandum Opinion by Justice Kerr

MEMORANDUM OPINION

Mark Alan Harrenstein raises a single punishment-related complaint on appeal from his conviction and 20-year sentence for methamphetamine possession: that the trial court reversibly erred by admitting testimony from a probation officer that Harrenstein was not a good rehabilitation candidate. Because controlling authority compels us to overrule Harrenstein's complaint, we affirm.

Background

A jury convicted Harrenstein of possession of methamphetamine, but he waived his right to have the jury decide punishment. At punishment, Scott Wallace—a 24-year probation officer who acted as the SAFP[1] coordinator for Young and Stephens County and who estimated that he had supervised thousands of defendants over his career—testified about Harrenstein's Young County probation file. Wallace had not been Harrenstein's probation officer, had not interviewed Harrenstein, and had not personally evaluated Harrenstein, so he was familiar with Harrenstein only "from a records standpoint."

When the State asked Wallace for his recommendation "regarding whether [Harrenstein] is a good candidate for rehabilitation," Harrenstein objected in part that Wallace had not "been qualified as an expert on rehabilitation." The trial court

[1]"SAFP is a substance-abuse felony punishment facility within the Texas Department of Criminal Justice." *Rouse v. State*, 300 S.W.3d 754, 758 n.6 (Tex. Crim. App. 2009).

sustained that objection but then allowed the State to prove up Wallace's qualifications. After a voir-dire examination, Harrenstein renewed his objection, stating, "I don't know if anybody can really be an expert on rehabilitation, and I understand this gentleman does quite a bit of useful work supervising probationers, but the problem is, without checking them after probation, how can you know if they were rehabilitated[?]" The trial court overruled the objection.

Wallace then testified that, hypothetically, a person who had used methamphetamine for 25 years, who had been to SAFP and rehab, and who had been unsuccessful on probation and parole would not be a good rehabilitation candidate. He also testified that, based on what he had heard in the courtroom and what he knew about Harrenstein from his file, he was not a good rehabilitation candidate.

After noting, "I'm not sure I hear the remorse or the change sufficiently," the trial judge sentenced Harrenstein to 20 years' confinement and a $2,500 fine.

Analysis

On appeal, Harrenstein argues that "no witness, expert or otherwise, may testify concerning a defendant's prospects for rehabilitation" because "no witness is qualified to render an expert opinion on the proper punishment." Although the State concedes error but contends that Harrenstein suffered no harm, its concession is not conclusive. *Saldano v. State*, 70 S.W.3d 873, 884 (Tex. Crim. App. 2002), *modified in part on other grounds sub silencio by Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App.

2009) (addressing preservation). We must therefore independently examine the merits of Harrenstein's complaint. *See id.*

The Court of Criminal Appeals has held that a probation officer may testify at punishment about a defendant's suitability for probation and that such testimony is relevant. *Ellison v. State*, 201 S.W.3d 714, 722–23 (Tex. Crim. App. 2006). Although the trial court may determine that probation-suitability testimony is inadmissible under evidentiary rules—Rule 403 or Rule 702, for example—such testimony is not inadmissible per se. *See id.* at 723; *Patterson v. State*, 508 S.W.3d 432, 437 (Tex. App.—Fort Worth 2015, no pet.) (citing Tex. R. Evid. 701, 702, and *Ellison*, 201 S.W.3d at 723, for the premise that the trial court must still determine whether the probation-suitability witness is qualified "either as an expert or based on personal knowledge").

Harrenstein did not cite or analyze *Ellison*, and the authority he cites in his brief is inapposite. *See DeLeon v. State*, 322 S.W.3d 375, 385 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (holding that "whether or not [proffered probation-suitability expert] was qualified, appellant's trial counsel was deficient in failing to object to the *highly inflammatory testimony* and for calling [probation officer] to the stand in the first place" (emphasis added)); *Dickey v. State*, Nos. 05-07-01090-CR, 05-07-01214-CR, 2008 WL 2877761, at *3 (Tex. App.—Dallas July 25, 2008, pet. ref'd) (not designated for publication) (declining to address whether probation officer was qualified to give probation-suitability testimony because even if she was not so qualified, appellant was not harmed by assumed error); *see also Sattiewhite v. State*, 786 S.W.2d 271, 290 (Tex.

Crim. App. 1989) (holding, in death-penalty case, that expert could not recommend life sentence to jury because a witness may not recommend a particular punishment to the fact-finder). Because Harrenstein has challenged only the admissibility of such testimony in general—not the trial court's particularized determination that Wallace was qualified to so testify—we overrule Harrenstein's sole point and affirm the trial court's judgment.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

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Delivered: June 17, 2021